The Honorable Franklin D. Burgess

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL MARTINEZ, Daniel Martinez, vs. HELEN MARTINEZ and THE SUQUAMISH TRIBE, Defendants.	Case No. C08-5503 FDB **REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS** NOTED ON MOTION CALENDAR: December 12, 2008

I. Relief Requested

Defendant Helen Martinez has moved for an order dismissing this action without prejudice pursuant to FRCP 12(b)(6) and submits the following reply to the Response to her Motion to Dismiss.

II. Argument & Authority

Controlling case law from the Ninth Circuit Court of Appeals requires that Daniel Martinez's complaint must be dismissed or stayed to allow the tribal court an opportunity to hear

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any challenge to its civil jurisdiction. There is clearly a colorable claim of tribal jurisdiction and none of the exceptions to the tribal court exhaustion doctrine apply here. The Martinezes' domestic relations proceedings should continue to be heard in the tribal court, where they have chosen to litigate in the past, and where Daniel Martinez has the opportunity to challenge the tribal court's jurisdiction if he chooses.

A. Daniel Martinez concedes he has failed to exhaust his tribal court remedies.

Daniel Martinez does not argue that he has made any attempt to challenge subject matter jurisdiction or personal jurisdiction in either the parties' domestic violence or dissolution proceedings; rather, he asserts that exhaustion is not required because (1) it is plain the Suquamish Tribal Court lacks jurisdiction and (2) exhaustion would be futile. As discussed below, the facts here do not meet these exceptions to the tribal court exhaustion doctrine.

1. The Suquamish Tribal Court's jurisdiction is probable given the consensual relationship created by Daniel Martinez and the inherent authority of the tribal court to adjudicate domestic relations proceedings involving parties residing within the boundaries of the Port Madison Reservation. Accordingly, Daniel Martinez must exhaust his tribal court remedies.

Daniel Martinez argues that tribal courts' civil jurisdiction over non-Indians has been rigorously limited by *U.S. v. Montana,* 450 U.S. 544, 101 S.Ct. 1245 (1981), and its progeny. He asserts that because it is plain no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule, the exhaustion requirement would serve no purpose other than delay. While it is true that tribal adjudicatory jurisdiction over non-members is ill-defined, *Smith v. Salish Kootenai Coll*., 434 F.3d 1127, 1137 (9th Cir. 2006) (en banc), quoting *Nevada v. Hicks*, 533 U.S. 353, 376, 121 S.Ct. 2304, 376 (2001) (Souter, J., concurring), the lack of clarity in and of itself disproves Daniel Martinez's assertion that tribal authority here is clearly lacking. When there is a plausible claim of tribal court jurisdiction, exhaustion is

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required. *Atwood v. Fort Peck Tribal Court Assiniboine and Sioux Tribes*, 513 F.3d 943, 948 (9th Cir.2008). Here, the tribal court's jurisdiction is likely proper, and therefore at least colorable.

As a starting point, it is not certain that the *Montana* rule applies to these proceedings. The main rule under *Montana* restricts tribal authority over non-member activities on non-Indian land. *Montana v. United States*, 450 U.S. at 564-66. Daniel Martinez argues that the parties' domestic relations proceedings involve only fee land because their home was located on non-Indian fee land within the boundaries of the Port Madison Reservation. While it's undisputed that Helen Martinez and the children lived on tribal land from 2006-2007, it is true that at other times during the marriage, the family lived in a home located on fee land. If the actions concerned solely fee land, the *Montana* analysis would apply. *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1074 (9th Cir.1999) ("Generally speaking, the *Montana* rule governs only disputes arising on non-Indian fee land, not disputes on tribal land; otherwise, the *Strate* Court's analysis of why a state highway on tribal land was equivalent to non-tribal land would have been unnecessary.") In addition to the fact that the family lived on both fee land and tribally-owned land, the *Montana* analysis is inapplicable given the nature of the dispute, which involves a relationship, rather than a single incident at a defined location.

Even if the *Montana* rule applies, the Martinez proceedings fall within the two exceptions to the main principal: first, jurisdiction is proper when nonmembers enter consensual relationships with a tribe or its members; second, a tribe may exercise civil authority over the conduct of non-Indians when that conduct threatens or impacts the tribe's political integrity, economic security, or health or welfare of the community. *U.S. v. Montana*, 450 U.S. at 565-566. Daniel Martinez fails to adequately address the applicability of both these exceptions.

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First, Daniel Martinez has undoubtedly created a consensual relationship as contemplated by *Montana* and clarified in subsequent case law. In 2007, Daniel Martinez availed himself of the tribal court by initiating a domestic violence protection order proceeding against Helen Martinez. He asserted the tribal court's jurisdiction over the subject matter and the parties, and was subsequently awarded a temporary order of protection, which granted temporary custody to Daniel, as well as exclusive right to the family residence and vehicle. Dkt. 9-2, Ex. B. By itself, this action constitutes a consensual relationship under *Montana*. *See Smith v. Salish Kootenai Coll.*, 434 F.3d 1127 at 1136 (nonmember's filing suit in tribal court established a consensual relationship[1]); *Atwood v. Fort Peck Tribal Court*, 513 F.3d 943 at 948, (colorable basis for jurisdiction existed when a non-Indian plaintiff had availed himself of a tribal forum in a prior suit, even though the tribal court case at issue was not initiated by plaintiff).

Yet this wasn't the only tribal court action in which Daniel Martinez participated. Daniel Martinez admits that he appeared in numerous tribal court proceedings during the parties' ten-year residence on the Port Madison Reservation, including a related case which he initiated. At no time in prior proceedings did Daniel Martinez object to the tribal court's jurisdiction. On the contrary, he appeared as a respondent in an additional dissolution proceeding and a prior protection order proceeding. Dkt. 9-2, Ex. A. Daniel Martinez's recurring involvement with the tribal court belies his reliance on the *Strate* decision, Dkt. 10 at p. 20-21, which reasoned that the civil authority of tribal courts is limited to protect non-Indian defendants from having to defend themselves in "an unfamiliar court." *Strate v. A-1 Contractors*, 520 U.S. 438, 459, 117 S.Ct. 1404 (1997). Likewise, Daniel Martinez's frequent participation in related Suquamish Tribal

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[1] Daniel Martinez asserts that the Ninth Circuit Court's decision in *Smith v. Salish Kootenai College* is distinguishable because in that case, a lower court had realigned the parties, making a non-tribal member the plaintiff. Even if *Smith*'s holding relied on its determination that the non-member was the plaintiff, the fact that Daniel Martinez has appeared as both petitioner and respondent renders this argument moot.

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Court proceedings distinguishes these facts from those in *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, --- U.S. ----, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008) (seeking the tribal court's aid in serving process on tribal members for a pending state-court action does not constitute consent to tribal court jurisdiction; bank's prior commercial dealings with Indian plaintiffs did not establish consensual relationship with respect to bank's subsequent sale of non-Indian fee land to non-Indians).

It also bears repeating that principles of res judicata apply to the tribal court's finding of subject matter jurisdiction. Having affirmatively asserted the tribal court's jurisdiction over the subject matter and the parties in a related proceeding in 2007 to his benefit, Daniel Martinez now wishes to attack the tribal court's jurisdiction. Daniel Martinez attempts to distinguish *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099 (1982), arguing in that case, "defendants actually challenged jurisdiction." Dkt. 10 at p. 22. This misconstrues the proper analysis. Daniel Martinez *asserted* jurisdiction as the plaintiff- it is Helen Martinez, then the defendant, who would have had the opportunity to object to the court exercising its jurisdiction. Regardless, the distinction lacks merit. The Supreme Court has stated that "a party that *has had an opportunity to litigate the question of subject matter jurisdiction* may not …reopen that question in a collateral attack upon an adverse judgment." *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1059 (9th Cir.1991), quoting *Insurance Corp. of Ireland*, 456 U.S. at 702 n. 9 (emphasis added).

Moreover, Daniel Martinez erroneously minimizes the factually similar and controlling case of *Atwood v. Fort Peck Tribal Court*, 513 F.3d 943 (9th Cir.2008). He points out that in that case, a previous custody determination in tribal court had not been dismissed. While it is true that the Martinezes have chosen to dismiss previous dissolutions and domestic violence

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protection order proceedings at various stages of completion, that fact has no bearing on the continuing jurisdiction of the tribal court. The prior tribal court domestic relations cases *are all related* to the instant proceedings. They all stem from the parties' marital relationship.

Second, the Suquamish Tribe has a strong interest in enforcing domestic violence laws as a necessary component of protecting self-government and controlling internal relations; therefore *Montana*'s second exception also applies to these matters. Daniel Martinez does not even attempt to address the points raised by Helen Martinez in her motion demonstrating that domestic violence impacts the health, safety and welfare of the Suquamish community. He concedes that domestic violence is a serious problem but fails to explain why such conduct occurring on Indian and non-Indians lands within the Port Madison Reservation would not pose a threat to public safety. The Suquamish Tribe has an interest in preventing domestic violence because it is not only responsible for protecting individual persons, but must also uphold the general order and well-being of the tribal community.

In his analysis of *Montana*'s second exception, Daniel Martinez misunderstands the nature of domestic violence and the relationship to the parties. The domestic violence alleged by Helen Martinez is not limited to "whatever happened at the Martinez home on the morning of February 27, 2008." Dkt. 10 at page 15. Domestic violence is a pattern of abusive behavior that is used to gain or maintain power and control over another intimate partner. *See* United States Department of Justice, Office of Violence Against Women, About Domestic Violence (2007), at 1, available at http://www.ovw.usdoj.gov/domviolence.htm. Behavior intended to intimidate, manipulate, humiliate, isolate, frighten, threaten, blame, or hurt Helen would not be limited to the parties' home located on fee land. "[A]busive behavior does not occur as a series of discrete events but rather pervades the entire relationship. The effects of psychological abuse, coercive

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behavior, and the ensuing dynamics of power and control mean that the pattern of violence and abuse can be viewed as a single and continuing entity." *Hernandez v. Ashcroft*, 345 F.3d 824, 837 (9th Cir.2003) (internal quotation marks omitted) (citing Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1208 (1993)).

Even if the analysis relied on an examination of physical assaults alone, the alleged facts demonstrate that Daniel Martinez's conduct was most likely not confined to a single location. In addition to describing the incident that occurred on February 27th, Helen Martinez's petition for a protection order alleged frequent acts of domestic violence by her husband against her as well as an assault against their daughter. Dkt. 8-2 at p. 3-4. It is also important to note that the petition for a domestic violence order for protection is an action that seeks to restrain and regulate conduct within the boundaries of the Port Madison Reservation. The relief sought is not exclusive to tribal land or fee land within the reservation boundaries. It would not matter if the events that support the petition had taken place on fee land alone because this is not civil litigation that seeks to adjudicate either a single event, or a series of events. This is in sharp contrast to *Strate*, which involved a suit for damages for a *past* event, and *Plains Commerce Bank*, which addressed a completed transaction of fee land. The protection order governs future behavior that could occur in a variety of places on the reservation. Likewise, the dissolution action will regulate the conduct of the parties as it pertains to contact between the two of them, as well as their conduct with regard to their children – conduct that will take place within the boundaries of the Port Madison Reservation, but will not be exclusive to fee land.

Furthermore, the domestic violence protection order is directly tied to issues in the parties' dissolution. "Protection order statutes generally permit courts to include custody and

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visitation provisions in the order, demonstrating that state and tribal legislatures have determined that there is a strong link between victim safety and court orders regarding the placement of children." Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence Against Women Act of 2000*, 13 Colum. J. Gender & L. 101, 114 (2004). Any court making determinations about the custody and visitation for the Martinez children would evaluate the presence of likelihood of harmful conduct, such as physical abuse of a child or a history of acts of domestic violence in determining their best interests. Because the two proceedings are inexorably tied together, *Montana*'s second exception applies to both proceedings.

Helen Martinez maintains that the domestic relations proceedings meet both the consensual relationship and health and safety exceptions to the *Montana* rule; however, even if they did not, the Montana rule only applies when there is no "different congressional direction." As explained in part B below, in passing the Violence Against Women Act, Congress expressly provided that tribal courts should have the authority to issue and enforce domestic violence protection orders.

2. Daniel Martinez has not demonstrated that exhaustion is futile.

Daniel Martinez correctly notes that tribal exhaustion is not required when there is a demonstrated lack of adequate opportunity to challenge the court's jurisdiction. *Nat'l Farmers Union*, 471 U.S. 845, 856 n. 21, 105 S.Ct. at 2454 n. 21 (1985). However, the facts in this case do not meet this exception. Despite the fact that Daniel Martinez has failed to challenge the tribal court's rulings directly or appealed any decisions to the Suquamish Tribal Court of Appeals, he argues that such challenges would be futile. He claims that because "the Suquamish Tribal Court has already ruled in other cases that it has civil jurisdiction over nonmembers,

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bringing a motion to dismiss the Martinez cases" would be "a waste of time" and "only serve to delay a ruling on this issue." Dkt. 10 at p. 20; Dkt. 11. The Tenth Circuit Court of Appeals addressed this argument in *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1508 (10th Cir.1997). In that case, appellants contended that they lacked an adequate opportunity to challenge jurisdiction because the Navajo tribal courts had already determined that they have jurisdiction over non-Indian activities occurring outside the reservation but within Navajo Indian Country. The court found that the argument lacked merit because the tribal courts continue to have authority to dismiss a case for lack of jurisdiction. Regardless of Daniel Martinez's counsel's past experience with the Suquamish Tribal Court, the simple, uncontroverted fact is that the issue was never raised; no motions were filed challenging jurisdiction in either proceeding, nor was the final Order for Protection appealed to the Suquamish Tribal Court of Appeals.

In *Boozer v. Wilder*, 381 F.3d 931 (9th Cir.2004), the Ninth Circuit Court of Appeals also concluded that the appellant failed to demonstrate that tribal court exhaustion was futile. In that case, a non-Indian defendant father moved to vacate a tribal court custody order without protesting the tribal court's jurisdiction. After a decision on his motion to vacate had remained pending in the tribal court for one year, the father challenged the tribal court's jurisdiction in federal court, alleging that the delay amounted to futility. The court found that the father failed to demonstrate that exhaustion would be futile because "Boozer made no effort to exhaust tribal court remedies before filing a federal claim." *Boozer*, 381 F.3d 931 at 936.

B. Daniel Martinez's interpretation of VAWA's grant of authority is not consistent with a plain reading of the statute.

Montana's main rule does not apply when there is a separate grant of authority from

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Congress[2]. By enacting the Violence Against Women Act (VAWA), Congress has specifically authorized the tribes to pass laws concerning domestic violence and to adjudicate violations of such laws. Under VAWA, protection orders issued by tribal courts have full jurisdiction to enforce foreign orders; likewise, their own orders are to be given full faith and credit by state courts and by other tribal courts. 18 U.S.C. § 2265.

Though Daniel Martinez alleges that he may not have received the DVPO petition[3], he concedes that he had reasonable notice, responded in writing and appeared at a hearing, which would satisfy VAWA's due process requirements. It is undisputed that Helen Martinez's domestic violence protection order was issued in accordance with Suquamish tribal law; however, Daniel Martinez asserts that the tribal court lacked jurisdiction under federal case law. He argues that VAWA does not confer civil jurisdiction on tribal courts to issue protection orders and that their civil jurisdiction is limited to the ability to enforce protection orders. Dkt. 10 at page 23-24. The interpretation proffered by Daniel Martinez simply cannot be reconciled with the plain language of the statute. 18 U.S.C. § 2265 provides:

> Any protection order *issued* that is consistent with subsection (b) of this section by the court of one State, *Indian tribe*, or territory…shall be accorded full faith and credit by the court of another State, Indian tribe, or territory.

18 U.S.C. § 2265 (a) (emphasis added). Subsection (b) then defines when a protection order is consistent with the provision in subsection (a):

> (1) such court has jurisdiction over the parties and matter *under the law of such State, Indian tribe, or territory;* and (2) reasonable notice and opportunity to be heard is given

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[2] Daniel Martinez claims that Congress could have authorized tribes to have unlimited civil jurisdiction over non-Indians in the "*Duro* fix," but chose not to. This is a flawed characterization of Congress's purpose in enacting this legislation. The *Duro* fix was responding to a particular gap that the *Duro* decision had created in the prosecution of crimes within tribal communities. No civil authority issue was before the Supreme Court in *Duro* and therefore Congress obviously didn't see the need to address a broader spectrum of jurisdictional issues.

[3] It appears that Daniel Martinez waived the right to raise this issue. Failure to receive a copy of the petition for a domestic violence protection order should have been raised before the tribal court at the hearing on March 27, 2008.

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> to the person against whom the order is sought sufficient to protect that person's right to due process.

18 U.S.C. § 2265 (b) (emphasis added). Thus, it is clear that under VAWA the Suquamish Tribal Court properly exercised its civil jurisdiction in granting first Daniel, then Helen, orders for protection.

C. Dismissal of Daniel Martinez's complaint is the appropriate remedy.

Daniel Martinez claims that the correct remedy for failure to exhaust tribal court remedies is staying the proceedings, rather than dismissal. However, the district court, at its discretion, may either dismiss a case or stay the action while a tribal court handles the matter. *Nat'l Farmers*, 471 U.S. at 857, 105 S.Ct. 2447; *Atwood v. Fort Peck Tribal Court*, 513 F.3d 943 at 948. In *Atwood*, the district court determined that dismissal was appropriate when, as here, the parties' domestic relations issue was still pending before the Tribal Court. *Id.* Moreover, the fact that Congress has provided that tribal courts should have the authority to issue and enforce domestic violence protection orders also necessitates dismissal of the instant proceedings.

III. Conclusion

The Suquamish Tribal Court's jurisdiction over the Martinez domestic relations proceeding is at least colorable and therefore Daniel Martinez has a duty to exhaust his tribal court remedies. He admits he has not attempted to do so, yet the matters do not meet the requirements of any exception to the exhaustion doctrine. Based on the foregoing, the defendant, Helen Martinez, respectfully requests that the Court dismiss Daniel Martinez's complaint for declaratory and injunctive relief.

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RESPECTFULLY SUBMITTED this 12th day of December, 2008.

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CERTIFICATE OF SERVICE

I, Jennifer Yogi, certify under penalty of perjury under the laws of the State of Washington that on the 12th day of December, 2008, I caused a copy of this Reply, to be delivered via electronic mailing in .pdf format with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attention of the following:

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Signed at Seattle, Washington, this 12th day of December, 2008.

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